UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ARMOR CONSTRUCTION, LLC

and Case 03–CA–148130

ROAD SPRINKLER FITTERS LOCAL UNION
NO. 669, U.A., AFL–CIO

Nicole Roberts, Esq.
for the General Counsel.
James Allen, Esq.
for the Respondent.
Allison Kelley, Esq. and
Natalie C. Moffett, Esq.
for the Charging Party.

DECISION

STATEMENT OF THE CASE

THOMAS M. RANDAZZO, Administrative Law Judge. This case was tried in Buffalo, New York, on October 5–7, 2015. The Road Sprinkler Fitters Local Union No. 669, U.A., AFL–CIO (the Charging Party or Union) filed a charge on March 13, 2015.[1] The General Counsel issued the complaint and notice of hearing in this matter on July 28, 2015,[2] and a notice of intention to amend complaint on September 18, 2015.[3]

The complaint alleges that Armor Construction, LLC (the Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by on or about January 15, 2015, demoting employee Michael Rublee from the job classification of foreman to helper and removing his privilege of using the company-owned truck, and on or about February 7, 2015, terminating Rublee's employment because of his engagement in "union and concerted activities." The complaint also alleges that the Respondent violated Section 8(a)(1) of the Act on

[1] The Union filed an amended charge on April 13, 2015, and a second amended charge on May 22, 2015.

[2] All dates are 2015, unless otherwise indicated.

[3] The Notice of Intention to Amend Complaint set forth the General Counsel's intention to amend paragraph VI of the complaint to assert in subparagraph (d): "About January 15, 2015, Respondent, by Scott Lynn, at Respondent's facility, impliedly threatened its employee with loss of employment because of his union activities." GC Exh. 1(n).

January 15 by interrogating employees about their union membership, activities and sympat; and on February 7 by prohibiting employees from discussing their wages and talking about the Union with other employees. In addition, at the hearing the General Counsel amended the complaint to allege that on January 15, the Respondent impliedly threatened an employee with loss of employment because of his union activity (complaint paragraph VI (d)). The Respondent, in its answer, denied that it violated the Act as alleged. In addition, it plead as an affirmative defense that Rublee was a supervisor under Section 2(11) of the Act, and that although it removed Rublee's use of a company-owned truck, Rublee was not demoted because he allegedly maintained his job title and rate of pay. (GC Exh. 1(i)).

On the entire record,[4] including my observation of the demeanor of the witnesses,[5] and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability company with an office and place of business in Falconer, New York, has been engaged in the design and installation of automatic sprinkler systems. Annually, the Respondent, in conducting its business operations described above, performs services valued in excess of $50,000 in States other than the State of New York.

The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union has been a labor organization within the meaning of Section 2(5) of the Act.[6]

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

The Respondent, a non-union company that designs and installs sprinkler systems, is owned and operated by Scott Lynn and his wife. Scott Lynn (herein Lynn) has been the Respondent's president since its inception in 2011. He oversees the Respondent's entire operation and staff, performs the bidding and estimating work, meets with customers, reviews

[4] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "Jt. Exh." for Joint Exhibit; "R. Exh." for Respondent's Exhibit; "GC Brief" for the General Counsel's brief; "CP Br." for the Charging Party's brief, and "R. Br." for Respondent's brief.

[5] In making my findings regarding the credible evidence, including the credibility of the witnesses, I considered the testimonial demeanor of such witnesses, the content of the testimony, and the inherent probabilities based on the record as a whole. In addition, I have carefully considered the testimony in contradiction to my factual findings, but I have discredited such testimony.

[6] The Respondent amended its answer at the hearing to admit that the Union was a labor organization within the meaning of the Act.

the design drawings, assists in the scheduling and delivery of sprinkler system materials to worksites, and is responsible for the payroll and financial operations of the company. Between 2013 and 2015, the Respondent employed approximately 7 foremen and 4–5 helpers (field personnel) who worked as a team installing the sprinkler systems in buildings. The Respondent also employs one administrative employee who performs clerical work, and project managers or designers who design the sprinkler systems, produce the blueprints for the field personnel to install the systems, and, along with Lynn, assign the field personnel to the Respondent's various jobsites.

Michael Rublee commenced his employment with the Respondent in April 2013 and worked for approximately 2 years until his discharge on February 7, 2015. Prior to working for the Respondent, Rublee had approximately 7 years of experience in the sprinkler installation trade, and he worked with Lynn at Allied Fire Protection, a union sprinkler installation contractor owned by Lynn's father. While employed at Allied, Rublee was a member of the Union, and he received training through the Union's apprenticeship program. Upon leaving his employment with Allied, Rublee was no longer a member of the Union.

2. Rublee's employment with the Respondent, contact with the Union, and discussions about wages with other employees

Rublee started as a helper for the Respondent, performing work such as cleaning, organizing material, cutting pipe, and making hanger measurements.[7] Several months after being hired, Rublee was promoted to foreman and was given a company-owned truck that included tools for work and personal use, which was consistent with the items provided to all of the Respondent's foremen.[8] As a foreman, Rublee was responsible for installing or "hanging" pipe for the sprinkler systems in accordance with the blueprints for the job, assigning tasks to helpers, and communicating with Lynn as to what work was to be performed. (Tr. 96). The Respondent's foremen also travel to jobs to perform service calls. The record establishes that helpers are generally unskilled laborers who are trained on the job until they develop the skills that enable them to read blueprints and install the sprinkler systems. (Tr. 172–173). The foremen and helpers work together as a team, with the foremen performing approximately 70% of the work on the jobsite, and with the helpers completing approximately 30% of the work. While either Lynn or the project managers create the blueprints at the Respondent's office, the blueprints frequently require changes. Rublee testified that for simple or routine changes, the foremen decide how to proceed with the installation. However, where the changes are more complex, the foremen contact Lynn or the Respondent's project managers who decide how to proceed. (Tr. 135–136). The extent to which jobs are not consistent with the blueprints and changes to the installation work are required is dependent upon the specific job, with some of the larger jobs requiring more changes than others.

[7] The parties stipulated that the employee classification of "helper" is an employee, and not a statutory supervisor within the meaning of Section 2(11) of the Act. (Tr. p. 8).

[8] Foremen are also provided gas cards with the company-owned trucks, but the cards are for work use only. Although Lynn testified that all foremen do not have an assigned company-owned vehicle, no witnesses, including Lynn, were able to identify a foreman who was not provided a company vehicle.

While the Respondent is a non-union company, the Union attempted to have the Respondent sign a contract to become a union contractor. Lynn testified that in 2013, Union business agent and representative Michael O'Connor visited the Respondent's shop and requested that Lynn sign a Union contract, but Lynn refused. (Tr. 37). In addition, Lynn testified that the Union visited the Respondent's facility in 2014. The union representatives also had contact and discussions with some of the Respondent's employees, and those contacts and discussions were brought to Lynn's attention. Lynn testified that in December 2011, former Respondent Foreman Floyd Austin reported to him that the Union asked him to participate in a Union program and to serve as a Union "mole" at the company, and that the union representatives visited a Respondent worksite in Pennsylvania. (Tr. 35). Rublee testified that in the Spring of 2013, while with helper Chris Johnson in a Burger King parking lot, he was approached by union representatives O'Connor and Gary Bitner, who spoke to him about his job with the Respondent. Rublee told Lynn about his discussions with the union members, and he testified that Lynn told him: "they are trying to get all my good guys, Mike, and trying to get you too." (Tr. 100). Lynn testified that Johnson also informed him of that contact with the union representatives, and that he told Johnson "the Union would want my guys to hurt me and because you are good workers." (Tr. 36–37). In addition, Lynn testified that in the Fall of 2014, Foreman Tailour Terhune told him that he was approached by the Union at the Respondent's William Mattar jobsite. (Tr. 37).

Throughout his 2 year career with the Respondent, Rublee estimated that he worked on hundreds of jobs as a foreman. Of those jobs, it appears that Rublee worked on nine larger jobs, or jobs of extended duration, consisting of the following: (1) The Legend Group, from April 19, 2013 to June 26, 2013; (2) Kalieda Health, from August 6, 2013 to January 2, 2014; (3) The Woodlands II, from November 6, 2013 to February 22, 2014; (4) Grace Manor 3rd Floor, from November 27, 2013 to April 10, 2014; (5) Bridgeview Apartments, from June 26, 2013 to October 2, 2014; (6) Shields Residence, from January 15, 2014 to February 26, 2015; (7) Aloft Hotel, from January 23, 2014 to January 15, 2015; (8) The Woodlands III, from September 25, 2014 to May 28, 2015; and (9) 173 Elm Street, from October 16, 2014 to February 29, 2015. (R. Exh. 5).

The record establishes that Rublee received numerous wage increases while employed by the Respondent. Rublee started at $11.00 an hour and was promoted to a foreman position with no increase in pay. The Respondent does not have a procedure which provides for automatic pay raises. Rather, pay raises are decided and issued by Lynn based on what he believes that employee is worth to the company. (Tr. 39). In June 2013, upon discussing wages with his helper, Rublee found out he was earning less money per hour than his helper. Rublee informed Lynn that he was discussing wages with his helper, and he requested a raise. Lynn granted that first wage increase to $12 an hour (from April 25, 2013 to July 24, 2013). (GC Exh. 5). Shortly thereafter, upon discussing wages with then-helper Terhune, Rublee found out Terhune was earning a higher wage than he was, and he requested a wage increase in July 2013. That second wage increase was subsequently granted by Lynn to $14.50 an hour (from July 30, 2013 to February 27, 2014). (GC Exh. 5). Rublee testified that when he told Lynn that he had been discussing wages with the other employees, Lynn informed him "we typically don't talk about wages," and he stated that such information was between him and Rublee. (Tr. 106).

In early 2014, when Rublee was earning $14.50 an hour, he reported to Lynn that he had been talking to employees Terhune and John Pinciaro about their wages, and he requested another raise. Lynn granted Rublee a third wage increase, which the Respondent's payroll records show was an increase to $15.25 an hour from March 5, 2014 to March 19, 2014. However, Rublee testified that Lynn informed him that "we don't talk about that," and such information was "exclusively between [them] and not the employees." (Tr. 107). The payroll records further reflect that Rublee was granted a fourth pay raise to $16.00 an hour from March 26, 2014 to May 6, 2014, and a fifth raise to $17.00 an hour, from May 13, 2014 to October 16, 2014. (GC Exh. 5). Rublee further testified that in September 2014, while working on the Aloft job, he spoke to Jim Rosengren, a sprinkler fitter for Local 669, about wages. Rublee subsequently reported that conversation about wages to Lynn and asked for a raise to $20 an hour. Lynn, while refusing to increase Rublee's wages to $20 an hour as requested, nevertheless granted him a sixth and final wage increase to $19 an hour, effective from October 23, 2014 to February 7, 2015, making him the second highest paid field employee for the Respondent and one of the employees who received the most pay raises at the company. (GC Exh. 5; Tr. 41).

After not receiving the wage increase to $20 an hour, Rublee spoke to union representative O'Connor about going back into the Union, and he told Respondent helpers Jamie Hall and Terhune about his intention to join the Union. At that time, Rublee had worked on the Aloft job mostly by himself. In late 2014, after he worked on the Aloft job, he worked on the 173 Elm job as his last job as a foreman for the Respondent. (Tr. 125). Rublee testified that Lynn had specifically assigned him to the 173 Elm project which was running behind schedule, stating that he knew Rublee could "pull it back together" and "get it back on schedule." (Tr. 124).

3. The events of January 15, 2015

On January 15, 2015, Rublee went to the Respondent's shop to pick up his paycheck and was directed to see Lynn who was holding his paycheck. Rublee testified that upon entering Lynn's office, Lynn immediately asked him if he was "looking for other work." (Tr. 112). When Rublee answered "no," Lynn told him if he was looking for other work, "there's the door, I can let you go right now . . . what's all this stuff about the Union, I keep hearing this stuff." (Tr. 112–113). Rublee testified that he was shocked by Lynn's statements. According to Rublee, during this discussion, Lynn told Rublee that his current job he was working on (the 173 Elm job) was "over on hours," and he complimented Rublee's work by stating that he did a good job on the Aloft Hotel job with all of the "extra tickets" on that job, and that it was a "job well done." (Tr. 113–115).[9] Lynn then told Rublee, "I'm pulling your truck and we'll see if you leave now." (Tr. 113). He further directed Rublee to work with Terhune who was the foreman on the Maple Road Senior Housing project.

[9] Rublee testified that extra tickets were forms submitted by the installer to reflect claims for extra work resulting from instances where they were required to move pipe for other trades on the projects, and that the "extra tickets" referenced by Lynn were additional business Rublee obtained for the Respondent on the Aloft project. This extra business was generated from Rublee moving installed piping from one location to another to accommodate the other trade crafts working on that job, and as a result of changes to the blueprint. Rublee testified that these resulted in the Respondent being paid for the extra work he performed on that job. (Tr. 113–115).

Lynn admitted that he had that conversation with Rublee on January 15, 2015. Although Lynn denied that he "confronted" Rublee in that conversation, he admitted that Jamie Hall reported to him that Rublee was talking about the Union (Tr. 48), and that he approached Rublee and told him that Hall reported he [Rublee] was "still talking about the Union." (Tr. 48–49). Lynn also admitted telling Rublee that he knew Rublee was talking about the Union. (Tr. 49). Critically, Lynn never denied interrogating Rublee about the Union, or that he made the statement: "there's the door, I can let you go right now . . . what's all this stuff about the Union, I keep hearing this stuff." (Tr. 82; 112–113). In addition, Lynn admitted in his affidavit that he told Rublee at the end of that conversation that Rublee would be given every opportunity to earn the foreman position and truck back. (Tr. 79–80).

4. The events of February 7, 2015

Rublee worked with Terhune on the Maple Road job as his helper (without the use of a company truck, tools or gas card) from January 15, 2015 until February 7, 2015. On that job, Rublee performed helper work cutting pipe and hanging pipe as Terhune requested.[10] Rublee testified that Terhune also had him perform some foreman work on that job because "he knew that [Rublee] could." (Tr. 169).

However, on February 7, 2015, Rublee's employment abruptly ended when he was discharged by Lynn in a telephone call. Rublee testified that Lynn told him "you are still disclosing your hourly wages and I will not have that." (Tr. 119). Lynn also told Rublee that Hall had just called him and informed him that Rublee had been talking about the Union, specifically stating that Hall had "called distraught that [Rublee] had unloaded a bunch of stuff on him about the Union." (Tr. 119). Lynn also stated that Terhune had called and reported that he had to repair a pipe that Rublee had raised an inch and a quarter too high on the Maple Road job, and Rublee told Lynn that he spoke to Terhune about it, and he raised the pipe to go over a dryer vent, and that it "shouldn't have been a big deal." (Tr. 119–120). Rublee testified that Lynn also told him that he was "disclosing [his] hourly wages and that he will not have that," and that Lynn stated: "I'm done, I'm letting you go." (Tr. 119).

Lynn did not dispute these statements attributed to him. Instead, Lynn testified that on the day he terminated Rublee, he received a call from Terhune, who reported that Rublee told him he was earning $19 an hour, and that Terhune was upset that he was more senior than Rublee and earning less money. After talking to Terhune, Lynn testified that he called Rublee and notified him that his employment with the Respondent was terminated. (Tr. 55–57). Lynn admitted informing Rublee that he had spoken to Terhune, and that Terhune told him Rublee was discussing his wages. (Tr. 57). Lynn also admitted admonishing Rublee by telling him, "Why do conversations about wages have to come up?" and "That shouldn't be happening." (Tr. 57).

5. Rublee's work record during his employment with the Respondent

It is undisputed that prior to his discharge, Rublee was never disciplined or suspended. In addition, Lynn never indicated that at any time during Rublee's 2 years of employment with the

[10] Lynn admitted that Terhune was the foreman on the Maple Road Senior Housing job, and that Rublee was the helper. (Tr. 58–59).

Respondent that his job was in jeopardy. In fact, Rublee testified that Lynn told him he was doing a good job "quite a few times" (Tr. 123), and that he was praised and rewarded for his "quality of work" on the jobsites. (Tr. 180). In this connection, the Respondent provided Rublee numerous wage increases. In addition, the Respondent provided employees with bonuses that were based on performance, and it issued Rublee bonus payments of $900 on December 19, 2013, $400 on October 2, 2014, and $100 on December 11, 2014. (GC Exh. 6). While acknowledging that Rublee was given pay raises and bonuses, Lynn testified that "he was being rewarded" for his performance. (Tr. 91). Despite the fact that Rublee was discharged, the Respondent never issued a discharge letter or anything in writing to Rublee setting forth the reasons for his discharge.

B. The Credibility Determinations

Most of the facts of this case as presented by the General Counsel through Rublee's testimony were either unrebutted or specifically admitted by Lynn, the Respondent's main witness. However, in those instances where Rublee's testimony differs from the testimonies of the Respondent's witnesses, as the finder of fact, I must determine the credibility of the witnesses. Credibility determinations may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the evidence, established or admitted facts, reasonable inferences that may be drawn from the record as a whole, and the inherent probabilities of the allegations. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all or nothing propositions. Indeed, nothing is more common than for a judge to believe some, but not all, of the testimony of a witness. *Daikichi Sushi*, 335 NLRB at 622; *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). Accord: *General Fabrications Corp.*, 328 NLRB 1114 fn. 1 (1999), enfd. 222 F.3d 218 (6th Cir. 2000). See also *J. Shaw Associates*, *LLC*, 349 NLRB 939, 939–940 (2007).

My observation during the trial was that Rublee was a very credible witness. He appeared sincere and honest in his demeanor, and he testified in a convincing, consistent, and straightforward manner. On the other hand, the Respondent's witnesses testified in a less convincing manner. In particular, I found that Lynn, the Respondent's main witness, presented testimony that was guarded, defensive, and frequently evasive. His testimony was also not credible because it was inconsistent, contradictory, and less than forthright. In fact, the record is replete with Lynn's testimonial inconsistency and contradiction. I shall not discuss completely all the conflicts in his testimony, for to do so would unduly lengthen this decision. However, suffice it to say that the record contains at least 20 instances where Lynn's sworn testimony at trial was inconsistent with, and contradicted by, his sworn statements in his affidavit dated June 4, 2015, and Respondent's Statements of Position dated May 8, 2015 (GC Exh. 8) and May 19, 2015 (GC Exh. 7), which were provided by the Respondent during the General Counsel's investigation of this case.[11] Thus, on those occasions where Rublee's testimony differs from

[11] For examples in the record of Lynn's evasive testimony impeached by conflicting or contradictory statements he previously made in his sworn affidavit or by contradictory assertions the Respondent made in its Statements of Position, see the following: Tr. 33; 35; 36; 37; 38–39; 39–40; 48–49; 49–50; 50–51;

Lynn's testimony and that of the Respondent's other witnesses, I fully credit Rublee and his testimony.

C. The Contentions of the Parties

The General Counsel and the Union contend that by Lynn's statements, the Respondent unlawfully interrogated Rublee about his union support and activities, impliedly threatened him with loss of employment, and coercively informed him that employees were prohibited from discussing their wages and the Union with other employees, in violation of Section 8(a)(1) of the Act. In addition, they contend that the Respondent demoted Rublee from his foreman position to a helper position, removed his privilege of using the company-owned truck, and subsequently discharged him because of his union activities and support, in violation of Section 8(a)(3) and (1) of the Act. In making this contention, they argue that Rublee was demoted to a helper when he was discharged, but even as a foreman, he was an employee who enjoyed the protection of the Act when he was discharged.

The Respondent, on the other hand, contends that Rublee was a statutory supervisor, and not an employee who enjoyed the protection of the Act. The Respondent, while asserting in its opening statement at the hearing that Rublee was "never demoted" and was "still a foreman" when he was discharged (Tr. 25), nevertheless acknowledged in its post-hearing brief that Lynn's hearing testimony "indicated that Rublee was being demoted from his position." (R. Br. p. 4). Despite that admission, the Respondent asserts that after his demotion, Rublee continued to work as a foreman and was therefore a supervisor who met the criteria of Section 2(11) of the Act. On that basis, the Respondent asserts that Rublee was not afforded the protection of the Act when he was discharged, and therefore his discharge did not violate Section 8(a)(3) and (1) of the Act as alleged. (Id. at p. 4).

The Respondent further contends that, even if Rublee was not a supervisor, the General Counsel has not met its burden of establishing a prima facie case of discrimination because "there is simply no evidence in the face of repeated disclosures by Rublee to Lynn of wage discussions and conversations with union leaders, that any of that activity was a factor in his termination." (Id. at p. 19). In addition, the Respondent contends that even if such evidence establishing a prima facie case existed, the record demonstrated that Rublee was terminated for good business reasons (Id. at p. 20), or "an amalgamation of valid causes," consisting of: performance issues regarding the quality of his work, lack of organization at worksites, poor productivity, and neglect of company assets (i.e. he failed to maintain and care for his company-assigned truck and tools). (Id. at pp. 3–4).

With regard to the independent Section 8(a)(1) complaint allegations, the Respondent failed to set forth any defenses in its brief to the allegations that Lynn unlawfully interrogated Rublee about his union activities and support, impliedly threatened Rublee with the loss of employment for his engagement in union and protected concerted activities, or unlawfully prohibited employees from talking about the Union. However, with regard to allegation that the Respondent unlawfully informed employees that they were prohibited from discussing their wages with employees, the Respondent specifically argues that its requests that employees keep

53; 55–56; 59; 64–65; 65; 65–66; 69–71; 79–80; 428; 429; 432; 439–441; see also GC Exh. 7 and 8.

their wages to themselves did not violate their Section 7 rights because the requests were not "a rule," and "the requests were never reduced to writing, published, and no discipline was contemplated or implied." (Id. at pp. 8–9; 20–21).

D. Analysis

1. The supervisory issue

As mentioned above, the Respondent initially asserted in its answer to the complaint and in its opening statement at the hearing that Rublee was a foreman when he was discharged on February 7, 2015, a position it alleges is a statutory supervisor position. The evidence however, included admissions by Lynn that Rublee had been demoted to helper (a non-supervisory position) at the time of his discharge. The Respondent subsequently acknowledged that Rublee was demoted to helper and altered its argument in its brief to assert that Rublee was nevertheless a supervisor outside the protection of the Act because he continued to perform the work of a foreman while in the helper position.

The undisputed evidence establishes that Rublee was demoted from the foreman position to the classification of helper on January 15, 2015, a position the parties have stipulated is a statutory employee position, and not a supervisory position within the meaning of the Act. After Rublee's demotion, he performed helper work (without the use of a company truck, tools or gas card) with Terhune, the foreman on the Maple Road job.[12] On that job, Rublee performed helper work from January 15 until February 7, 2015. However, Rublee testified that he did perform some foreman work on that job because it was at the request of Terhune who knew that he was capable of performing that work. I find that even though Rublee performed some foreman tasks as a helper on that job, the majority of his work was helper work. Rublee's demotion constituted a significant change in his position, and the fact that he performed some occasional foreman tasks on that job is insufficient to establish that he possessed any indicia of supervisory status or was anything other than a statutory employee. On that basis, I find the record establishes that Rublee held the position of helper and was a statutory employee who enjoyed the protection of the Act when he was discharged on February 7, 2015.

However, regardless of whether Rublee was a foreman or a helper who occasionally performed foremen work at the time of his discharge, I find that even as a foreman prior to his demotion, he was not a statutory supervisor under the Act.

Section 2(11) of the Act defines a supervisor as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

[12] Lynn admitted that Terhune was the foreman on the Maple Road Senior Housing job, and that Rublee was the helper.

It is well established that the possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to confer supervisory status, provided that the authority is exercised with "independent judgment" on behalf of management and not in a routine manner. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001); *Clark Machine Corp.*, 308 NLRB 555 (1992); *Bowne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986). In order to establish that individuals are supervisors, the asserting party must show: (1) that the purported supervisor has the authority to engage in any one of the twelve enumerated supervisory functions; (2) that their "exercise of such authority is not a merely routine or clerical nature, but requires the use of independent judgment;" and (3) that their authority is exercised "in the interest of the employer." *NLRB v. Kentucky River*, supra at 710–713. It is also well established that the burden of proving supervisory status rests on the party asserting such status. *Kentucky River*, supra at 713; *Billows Electrical Supply of Northfield, Inc.*, 311 NLRB 878 (1993); *Ohio Masonic Home, Inc.*, 295 NLRB 390 (1989); *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979). The party seeking to prove supervisory status, in this case the Respondent, must establish it by a preponderance of the evidence. *Republican Co.*, 361 NLRB No. 15, slip op. at 5 (2014).

Although Section 2(11) requires only possession of authority to carry out an enumerated supervisory function, not its actual exercise, the evidence still nevertheless must suffice to show that such authority actually exists. *Mountaineer Park, Inc.*, 343 NLRB 1473, 1474 (2004). The Board has held that purely conclusory evidence does not establish supervisory indicia. *Community Education Centers, Inc.*, 360 NLRB No. 17, slip op. at 11 (2014); *Volair Contractors, Inc*., 341 NLRB 673, 675 (2004). In addition, any lack of evidence in the record is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999).

Despite asserting in its amended answer that Rublee possessed the indicia to hire, transfer, promote, discharge, assign, discipline, responsibly direct, adjust grievances or effectively recommend such action, at the hearing in this matter the Respondent only elicited testimony regarding the indicia to assign, responsibly direct, and effectively recommend the hiring and discharge of employees. However, for the reasons set forth below, I find that the Respondent has failed to carry its burden of showing beyond a preponderance of the evidence that Rublee exercised independent judgment in the assignment and direction of work, or effectively recommended the hiring and discharge of employees, or that Rublee possessed any indicia of supervisory authority.

a. The assignment of work

In *Oakwood Healthcare, Inc*. 348 NLRB 686, 689 (2006) the Board noted that with regard to the meaning of the term "assign" in Section 2(11) of the Act:

> [W]e construe the term "assign" to refer to the act of designating an employee to a place (such as a location, department, or wing) appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to employee. That is, the place, time, and work of an employee are part of his/her terms and conditions of employment. The assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night) or to certain

> significant overall tasks (e.g. restocking shelves) would generally qualify as "assign" within our construction.

The Board has held that ad hoc instructions to perform discrete tasks are not assignments, and that the assignment of work must be issued with independent judgment. *Entergy Mississippi, Inc.*, 357 NLRB, 2150, 2157 (2011).

The Respondent has failed to present evidence establishing that foremen possess the authority to assign helpers to a certain job or location. Instead, the record establishes that Lynn or the project managers assign the field personnel (foremen and helpers) to the Respondent's various jobsites. (Tr. 427–428). Lynn admitted in his affidavit: "I assign the foreman to a job, and I and the project managers then assign the helpers to the specific job." (Tr. 427–428). The Respondent also failed to present any credible evidence that foremen have actually assigned helpers to a designated location or jobsite when they believed such assistance was necessary. To the contrary, Rublee credibly testified that he repeatedly asked Lynn to assign a helper on the Aloft Apartment job on a bi-weekly basis with little success, which resulted in Rublee working alone on that year-long job approximately 70% of the time. (Tr. 110–111; 164).

The Respondent has likewise failed to establish that foremen assign significant work duties or tasks to the helpers, who they work with as a team. The foremen, who work with tools 100% of the time, install or "hang pipe" for the sprinkler systems in accordance with the blueprints for the jobs, assign routine tasks to helpers, and communicate with Lynn as to what work is to be performed. (Tr. 96, 163). The evidence in this case reveals that the helper's work is simple, routine, and repetitive in nature. It is neither complex nor skilled, and is essentially that of an unskilled laborer, which consists of cleaning up, organizing materials at the jobsite, laying out the pipe, opening and taping the ends of the pipe, getting the pipe ready to be screwed in, doing the hanger measurements, cutting the hangers, and finally, cutting the pipe to length. (Tr. 166; 172; 187; 178–179). Where routine work of a repetitive nature is assigned, the Board has held that is not indicative of supervisory status. *Highland Telephone Cooperative, Inc.*, 192 NLRB 1057 (1971); *Commercial Fleet Wash, Inc*., 190 NLRB 326 (1971).

The record also fails to establish that foremen assign tasks beyond those already delegated simple and routine helper functions, or that the foreman exercise independent judgment in assigning those routine functions. The foremen merely follow the worksite blueprints and the national code governing the installation of sprinkler systems to determine the tasks to be performed by the helpers. In addition, at times when the installation work deviates from the blueprints due to having to work around other crafts on the jobsites, the assignment of tasks is still standard as the helpers know what tasks to perform. (Tr. 136). The Board has held that such ad hoc instructions to perform discrete tasks are not assignments, which must be issued with independent judgment. *Entergy Mississippi, Inc.*, 357 NLRB 2150, 2160 (2011) (assigning field employees from their assigned tasks to work on a trouble case is not assignment of significant overall duties but mere ad hoc instruction).

Thus, I find that the assignment of such simple, routine, and repetitive tasks do not evince the exercise of independent judgment by the foremen.

b. The responsible direction of work

In *Croft Metals, Inc*., 348 NLRB 717, 721 (2006) the Board summarized the definitions of "responsibly to direct" and "independent judgment" as set forth in its decision in *Oakwood Health Care*, supra, as follows:

> The authority "responsibly to direct" is "not limited to department heads," but instead arises "[i]f a person on the shop floor has 'men under him,' and if that person decides 'what job shall be undertaken next or who shall do it,' . . . provided that the direction is both 'responsible,' . . . and carried out with independent judgment." "[F]or direction to be 'responsible,' the person performing the oversight must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed are not performed properly." "Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It must also be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take the steps." (Internal citations omitted).
>
> "[T]o exercise 'independent judgment,' an individual must at a minimum act, or effectively recommend action, free of the control of others and from an opinion or valuation by discerning and comparing data."

As mentioned above, the Board considers a person to be responsible for the direction of other employees' work when that person performs the oversight of the work and is held accountable for the performance of others. That putative supervisor must be empowered to take corrective action and suffer the risk of adverse consequences for the deficiencies of others. *Oakwood Healthcare*, supra; *Entergy Mississippi*, supra; see also *Volair Contractors, Inc.*, supra. In addition, simply requesting that employees take certain action is insufficient to establish responsible direction of work. *Golden Crest Healthcare Center*, 348 NLRB 727, 734 (2006).

In this case, the record is devoid of evidence reflecting that foremen are held accountable for the performance of others or that they are empowered to take corrective action with regard to helpers' work that may be unsatisfactory. While foremen are the lead persons on the jobsites, the evidence reveals that with regard to oversight of the work performed, Lynn and the project managers visit the jobsites to check on the progress of the work and evaluate if the job is being done correctly. (Tr. 236). More importantly, there is no evidence that foremen have been informed by Lynn, or any other Respondent management official, that they have the authority to take corrective action against helpers who failed to satisfactorily perform their work, or that they would suffer the consequences for unsatisfactory helper work. Where, as here, putative supervisors have not been notified by management that they are vested with a supervisory power, the Board will decline to find supervisory status. *Entergy Mississippi*, supra at 2157; see also *Volair Contractors, Inc.*, supra at 675.

Lynn offered vague testimony about his belief that Rublee had, on one occasion, sent an employee home from work. However, Rublee testified that the helper, Jamie Hall, was sick that

day, and decided to go to work and ended up sleeping in his truck. Hall subsequently decided not to work and to return home. (Tr. 196–197). Thus, Rublee credibly testified that he did not send Hall home from work, or give him permission to leave work. (Tr. 196–200). Instead, Hall left work on his own accord and Rublee simply informed Lynn that Hall was not at work that day. Such evidence is insufficient to establish that Rublee was accountable for the performance of other employees.

The Respondent also failed to present evidence establishing that other foremen were responsible or accountable for the performance of others. In this regard, Respondent witness Pinciaro testified that when work performed by helpers was incorrect, he would teach the helper how to perform the task correctly. (Tr. 122). Similarly, Buck Seekings testified that when work performed by a helper was not satisfactory, he first teaches the helper by explaining how the work is correctly to be done, and if it is still not done correctly, he does the work himself. (Tr. 244). While Pinciaro testified that on one occasion he sent a helper home from work, that helper failed to report to work for an hour and a half, and Pinciaro had reported the incident to Lynn. (Tr. 222–223). Pinciaro's testimony did not reveal that Lynn ever conveyed to any foremen that they had the authority to send employees home or that they were empowered to take corrective action with regard to helpers' work that may be unsatisfactory.

The evidence establishes that the direction of work at the Respondent's jobsites comes from Lynn and the jobsite blueprints. (Tr. 169–170). In fact, Rublee testified that little direction is needed as the blueprints and national codes for sprinkler installation are followed and the pipes are laid out. (Tr. 192). As far as the direction of work from the foremen, Rublee testified that the helper's work is routine and requires little direction, and that when he directed helpers in what to do on the jobsites, it did not require his independent judgment because they knew what tasks to perform. (Tr. 165–166). As the foremen merely follow the worksite blueprints and the installation codes to determine the repetitive helper tasks and direct their routine work, such circumscribed authority does not indicate the use of independent judgment. The Board has specifically found that leadmen who assign tasks to a crew based on blueprints provided by the employer is routine in nature and does not establish the exercise of independent judgment necessary for supervisory status. See *Volair Contractors, Inc*., supra at 675; *Artcraft Displays, Inc*., 262 NLRB 1233, 1234–1235 (1982); see also *Electrical Specialties, Inc.*, 323 NLRB 705, 707 (1997).

In addition, it is clear that the foremen, as the more experienced persons in the craft on site, merely provide guidance to the helpers as a means of training. The evidence establishes that sprinkler installation work is learned on the job, and the Board has held that performing such on-the-job training is insufficient to establish supervisory status. *Chrome Deposit Corp*., 323 NLRB 961, 962 (1997).

c. The effective recommendations of hire and discharge

The Board has held that the authority to effectively recommend one of the indicia of supervisory authority means that the recommended action is taken without independent investigation from superiors. *Wesco Electrical Co*., 232 NLRB 479 (1977). The Respondent contends that foremen have the authority to recommend the hiring and discharge of employees. In support of that argument, the Respondent relies on Lynn's conclusory assertion that Rublee

recommended the discharge of helper Tom Lupton. (Tr. 365). Lynn's testimony, however, failed to identify any specific statement allegedly made by Rublee about Lupton to warrant Lynn's conclusion that Rublee was recommending his discharge. Lynn's testimony was also contradicted by Rublee's credible testimony that he never recommended that Lupton be terminated. (Tr. 482). Rublee elaborated on this issue, testifying that Lynn asked him how Lupton was doing about a month into his (Lupton's) employment, and Rublee told Lynn that Lupton was "a little slow, but learning." (Tr. 469). As mentioned above, where Lynn's testimony differs from Rublee's, I have credited Rublee's testimony because he was a very credible witness, and Lynn was not.

In addition, even assuming that Rublee's assessment of Lupton's work was considered a "recommendation," it is undisputed that such personnel decisions are made solely by Lynn. Lynn stated in his affidavit that "foremen do not have the authority to suspend, layoff, recall, discharge or discipline but they can make such recommendations although [he] ultimately make[s] the decision whether such will occur," and he also admitted that he does not always follow the recommendations of the foremen. (Tr. 432–433). Lynn also conducted his own investigation of Lupton's work, testifying that he analyzed Lupton's labor/cost per project and ultimately decided to lay him off. (Tr. 366–372; R. Exh. 2). Thus, the evidence shows that Lynn based his decision to lay off Lupton on his own investigation and his analysis into Lupton's labor costs. I find this evidence is insufficient to establish that Rublee effectively recommended that Lupton be discharged. Furthermore, the credible evidence shows that Rublee did not make a recommendation regarding Lupton's employment, but instead offered a factual assessment of his job performance. The Board has found that factual assessments or opinions expressed concerning the job performance of other employees, with nothing more, do not establish supervisory status. *International Center for Integrative Studies/The Door*, 297 NLRB 601 (1990); *Willis Shaw Frozen Food Express, Inc*., 173 NLRB 487, 488 (1968).

With regard to Respondent's argument that foremen effectively recommend the hiring of employees, Lynn testified that Pinciaro recommended that Chris Johnson be hired. (Tr. 425). However, Pinciaro testified that he had not performed any hiring duties. He suggested his friend Chris Johnson for hire, but Lynn conducted the interview on his own and decided to hire Johnson. (Tr. 224). It is clear that Pinciaro did not conduct or participate in the interview, nor did he review Johnson's experience with Lynn or have any role in making the decision to hire him. (Tr. 235). The Board has held that where individuals have no role in interviewing job applicants, and do not participate in the decision to hire applicants not personally known to them, the evidence is insufficient to establish that those individuals effectively recommend hiring. See *North Shore Weeklies, Inc.*, 317 NLRB 1128, fn. 4 (1995); *Poor Richard's Pub*, 220 NLRB 1363, 1364, fn. 4 (1975). Finally, because there is no evidence that the Respondent ever made Rublee aware of any authority to recommend the hiring or discipline of employees, or that he ever exercised such authority, it cannot be a basis for concluding that Rublee was a supervisor. *Entergy Mississippi*, supra at slip op. 8; see also *Volair Contractors*, supra at 675.

Thus, in applying the traditional criteria for the establishment of supervisory status to the facts of the instant case, I find that the Respondent failed to meet its burden of proving that foremen possess indicia of supervisory authority. Accordingly, I find that Rublee was not a

supervisor within the meaning of Section 2(11) of the Act at the time of his discharge, or at any time during his employment with the Respondent.[13]

2. The alleged violations of Section 8(a)(1) of the Act

a. The implied threat of loss of employment on January 15, 2015

As mentioned above, it is undisputed that Rublee was directed to Lynn's office on January 15, 2015, where Lynn asked him if he was "looking for other work." When Rublee answered "no," Lynn told him if he was looking for other work, "there's the door, I can let you go right now . . . what's all this stuff about the Union, I keep hearing this stuff." It is also undisputed that during this meeting, Lynn told Rublee he was "pulling [his] truck," and commented "we'll see if you leave now."

Despite the fact that Lynn testified at the hearing in this matter, he never denied making these statements to Rublee. With regard to Lynn's statement "there's the door, I can let you go right now… what's all this stuff about the Union, I keep hearing this stuff," the General Counsel alleges that the Respondent unlawfully implied a threat of the loss of employment in violation of Section 8(a)(1) of the Act.

Section 8(a)(1) of the Act provides that it shall be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of the Act." 29 U.S.C. 158(a)(1). An employer violates Section 8(a)(1) by statements that are coercive and which have a reasonable tendency to interfere with employees' rights under the Act. *Scripps Memorial Hospital Encinitas*, 347 NLRB 52 (2006); *Exterior Systems, Inc.*, 338 NLRB 677, 679 (2002); *Lin Rogers Electrical Contractors*, 328 NLRB 1165, 1167 (1999).

I find that Lynn's statement referencing the Union and that if Rublee was looking for other work, "there's the door" and he could "let him go," was coercive and implied the threat of the loss of employment, and therefore had a reasonable tendency to interfere with Rublee's rights under the Act. The Board has long held employer statements that employees can leave their employment in the context of their union support or discussion of unionization are coercive and implicitly threaten discharge in violation of Section 8(a)(1) of the Act because they convey the impression that the employer considers engaging in union activity incompatible with continued employment. *Equipment Trucking Co., Inc.*, 336 NLRB 277 (2001) (in response to employee's statement of union support the respondent's statement that ". . . if [he] didn't like it, find another job," implied a threat of discharge); see *Padre Dodge*, 205 NLRB 252 (1973) (respondent statement to known union supporter that if he was unhappy with his job, why did he continue his

[13] The Respondent also argues in its brief that Rublee allegedly possessed "secondary indicia of supervisory status," in particular that he was the second highest paid field employee and he was allegedly viewed by a several helpers as a supervisor. (R. Br. pp. 12–13). I find it unnecessary to consider these alleged secondary indicia relied on by the Respondent, as the Board has held that when there is no evidence that an individual possesses any one of the primary indicia for supervisory status enumerated in Section 2(11) of the Act, the secondary indicia which are not statutory indicators are insufficient by themselves to establish statutory supervisor status. *Volair Contractors*, supra at 674, fn. 8; *J.C. Brock Corp*., 314 NLRB 157, 159 (1994); See also *St. Alphonsus Hospital*, 261 NLRB 620, 626 (1982).

employment, conveyed an implied threat that engaging in union activities and continued employment were essentially incompatible); *299 Lincoln Street, Inc*., 292 NLRB 172 (1988) (respondent's statement to employee suggesting that she quit if she supported the union found coercive and a violation of 8(a)(1)); see also *Stoody Co*., 312 NLRB 1175, 1181 (1993).

Based on the above, Lynn's statement to Rublee constituted an implied threat of the loss of employment, in violation of Section 8(a)(1) of the Act.

b. The unlawful interrogation on January 15, 2015

As mentioned above, when Rublee was directed to see Lynn in his office on January 15, 2015, it is undisputed that Lynn asked Rublee "what's all this stuff about the Union, I keep hearing this stuff." (Tr. 113). The General Counsel alleges that Lynn's questioning constituted an unlawful interrogation of Rublee's union membership, activities and sympathies.

With issues of interrogation, the Board determines "whether under all the circumstances the interrogation [of an employee] reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Scheid Electric*, 355 NLRB 160 (2010); *Bloomfield Health Care Center*, 352 NLRB 252 (2008), quoting *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In *Intertape Polymer Corp*., 360 NLRB No. 114, slip op. at 1 (2014), the Board noted that, based upon its decisions in *Phillips 66 (Sweeny Refinery)*, 360 NLRB No. 26, slip op. at 5 (2014) and *Rossmore House*, supra, it considers the following factors in determining whether questioning an employee regarding their union sympathy is unlawful:

1. whether there is a history of employer hostility to or discrimination against protected activity;
2. the nature of the information sought;
3. the identity of the questioner;
4. the place and method of the interrogation; and
5. the truthfulness of the employee's reply.

Applying and balancing these factors, I find it inconceivable that the questioning of Rublee could be more coercive, as all of the factors strongly indicate a coercive interrogation. As an indicator of coerciveness, the evidence reveals Lynn's hostility toward the Union as reflected in his un-rebutted statements to Rublee that the Union was "out to hurt him" and take all his good employees. The questioning occurred at a time when the Union was requesting that Respondent become a union contractor and when the representatives of the Union were visiting the Respondent's office and some of its jobsites. The nature of the information sought reflects the coerciveness of the interrogation, as it concerned whether Rublee knew anything about the Union and presumably its organizing efforts. The identity of the questioner reflects the coerciveness of the statement as it came from the Respondent's highest ranking official—its owner and president. The Board has held that such interrogations from high-ranking employer officials weigh in favor of finding that the questioning was coercive. See *Matros Automated Electrical Construction Corp.*, 353 NLRB 569, 571 (2008), enfd. 366 Fed. Appx. 184 (2d Cir. 2010). The place and method of the interrogation is also evidence of its coerciveness, as Rublee

was directed to Lynn's office for a one-on-one confrontation,[14] and Lynn's method of interrogation was clearly coercive as his inquiry about the Union was accompanied by an implied threat of the loss of employment. Finally, the fact that Rublee never replied to Lynn's question of "what's all this stuff about the union" is a factor in favor of finding it coercive as Rublee, who testified that he was surprised by the questioning and the statements Lynn made in that conversation, was likely reluctant to answer that question.

Under these circumstances, the *Intertape Polymer* factors support a finding that the question Lynn directed to Rublee constituted an unlawful interrogation of his Union sympathies and support, in violation of Section 8(a)(1) of the Act.

c. The coercive statements on February 7, 2015, prohibiting employees from discussing their wages and the Union with other employees

The undisputed record establishes that Rublee was told by Lynn on several occasions not to discuss his wages with other employees, and that such information was confidential. Lynn admitted that he prohibited employees from discussing their wages with each other, and that he instructed employees to keep their wages confidential. Despite that directive, Rublee spoke to employees about wages, and he reported those discussions directly to Lynn. Lynn also acknowledged that he knew Rublee spoke to other employees about wages.

After Rublee was demoted and had his privilege of using the company-owned truck and gas card removed, he worked with Terhune on the Maple Road job as his helper starting on January 15, 2015. However, on February 7, 2015, his employment ended when he was abruptly informed by Lynn in a telephone call that he was being discharged. Lynn stated: "you are still disclosing your hourly wages and I will not have that." Lynn also told Rublee that Hall informed him that Rublee had been talking about the Union, specifically stating that Hall had "unloaded a bunch of stuff about [Rublee] talking about the union." Lynn ended that conversation by informing Rublee that he was "letting him go."

The General Counsel alleges that Lynn's statements to Rublee unlawfully prohibited him from discussing his wages and talking about the Union, which interfered with, restrained, and coerced him in the exercise of his Section 7 rights. Lynn did not dispute these statements attributed to him. In fact, he admitted that Hall told him that Rublee was still talking about the Union, and that Terhune had just told him that he found out he was being paid a lower wage than Rublee. However, with regard to these allegations, the Respondent argues that its request that employees keep their wages to themselves did not violate their Section 7 rights because the requests were not "a rule," and "the requests were never reduced to writing, published, and no discipline was contemplated or implied." (R. Br. at pp. 8–9; 20–21).

Section 7 of the Act, which grants employees the unfettered right to engage in concerted activities for mutual aid and protection, encompasses the right of employees to ascertain what wages are paid by their employer, as wages are a vital term and condition of employment. The Board has held that it is unlawful for an employer to prohibit employees from discussing their

[14] See *Morgan Services*, 284 NLRB 862, 863 (1987) (summoning employees from work to manager's office was "unusual event creating an atmosphere of unnatural formality").

salaries/wages, because directing employees not to engage in such activity, and thus implying the employer will not look favorably on those employees engaging in such activity, inhibits employees in the exercise of their Section 7 rights. *Triana Industries*, 245 NLRB 1258 (1979); *Automatic Screw Products Co.*, 306 NLRB 1072, 1073 (1992); *Scientific-Atlanta, Inc*., 278 NLRB 622, 624–625 (1986). In the instant case, it is undisputed that Lynn informed Rublee that he was prohibited from discussing his wages with other employees and he admonished him for talking about the Union, thereby inferred that he was prohibited from talking about the Union. I find that Lynn's statements implied that he would not look favorably on Rublee for such discussions and that it had a reasonable tendency to coerce him in the exercise of his protected rights to engage in union and protected concerted activities under the Act.

In concluding that Respondent's prohibitions to discussing wages and the Union are unlawful, I specifically find that the Respondent's asserted defenses (i.e. that it did not violate the Act because the requests were not a formal rule, were never reduced to writing or published, and no discipline was intended or contemplated by Lynn's statement) are misplaced and without merit. Initially, I note that the Respondent is mistaken with regard to the nature of the allegation. The General Counsel does not allege in the complaint that the Respondent promulgated and maintained an unlawful rule. Instead, the complaint alleges that the Respondent, by Lynn, prohibited employees from discussing wages or talking about the Union, which interfered with, restrained, and coerced Rublee in exercising his rights under the Act. In addition, the evidence establishes that Lynn, by his statements to Rublee when he was being discharged on February 7, 2015, conveyed that he was prohibited from discussing wages and talking about the Union, both clear unfair labor practice violations. The fact that the prohibitions were not formally reduced to writing or contained in "rules," the breach of which would imply sanctions, does not make them any less coercive. See *Triana Industries*, supra.

I find equally unavailing the Respondent's argument that the prohibitions were not coercive because they were never intended to result in discipline. The Board has long held that the standard to be used in analyzing statements alleged to violate Section 8(a)(1) is whether they have a reasonable tendency to coerce employees in the exercise of their Section 7 rights. *Unbelievable, Inc*., 323 NLRB 815, 816 (1997); *Corporate Interiors, Inc*., 340 NLRB 732 (2003). The intent or motive of the employer is not relevant to this analysis, and it is therefore immaterial. *Corporate Interiors, Inc*., supra; *KSM Industries, Inc.*, 336 NLRB 133 (2001); *Concepts & Designs*, 318 NLRB 948, 954, 955 (1995); *Puritech Industries*, 246 NLRB 618, 622–623 (1979).

Accordingly, I find that the Respondent, by the statements attributed to Lynn, prohibited Rublee from talking about his wages and the Union with employees, both in violation of Section 8(a)(1) of the Act.

3. The alleged violations of Section 8(a)(3) and (1) of the Act

a. The law

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) of the Act turning on employer

motivation. First, the General Counsel must make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983). In *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

To establish the initial burden under *Wright Line*, the elements commonly required to support such a showing are union or protected activity by the employee, employer knowledge of that activity, and animus against that activity on the part of the employer. *Mesker Door*, 357 NLRB 591, 592 and fn. 5 (2011); *Donaldson Bros. Ready Mix, Inc*., 341 NLRB 958, 961 (2004); *L.B.&B. Associates, Inc. d/b/a North Fork Services Joint Ventures*, 346 NLRB 1025, 1026 (2006); *Willamette Industries*, 341 NLRB 560, 562 (2004); See also *DHL Express (USA), Inc.*, 360 NLRB No. 87 (2014). Proof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Mesker Door*, supra, at 592; See *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). As support for an inference of unlawful motivation, the Board may rely on, among other factors, disparate treatment of the affected employee and the timing of the discipline relative to the employee's protected activity. *Mesker Door*, supra; see *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). In addition, the Board may infer animus against protected activities from pretextual reasons given for the adverse employment action. *DHL Express (USA), Inc.*, supra, slip op. at 1 and fn. 1 (2014).

On such a showing, the burden shifts to the Respondent to demonstrate that the same action would have taken place even in the absence of the protected conduct. *Lucky Cab Co.*, 360 NLRB No. 43, slip op. 6 (2014); *Austal USA, LLC*, 356 NLRB 363, 364 (2010). This burden may not be satisfied by an employer's proffered reasons that are found to be pretextual, i.e. false reasons or reasons not in fact relied upon for the adverse employment action. Rather, it is well established that a finding of pretext defeats an employer's attempt to meet its rebuttal burden. *Lucky Cab Co*., supra, slip op. at 6; *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB 633, 637 (2011), enfd. sub nom. *Mathew Enterprise, Inc. v. NLRB*, 498 Fed. Appx. 45 (D.C. Cir. 2012). In addition, it is apparent that the Respondent does not sustain its burden by simply showing that a legitimate reason for the action existed. As the Board stated in *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984):

> We have held that the burden shifted to an employer under *Wright Line* is one of persuasion, and affirmative defense in which the employer must demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. If an employer fails to satisfy its burden of persuasion, the General Counsel's prima facie case stands unrefuted and a violation of the Act may be found. See *Wright Line*, 251 NLRB at 1088 fn. 11; *Bronco Wine Co*., 256 NLRB 53 (1981); *Rikal West, Inc.*, 266 NLRB 551 (1983). Cf. *Magnesium Casting Co*., 259 NLRB 419 (1981).

Therefore, in rebutting the General Counsel's prima facie showing that the protected conduct was a "motivating factor" in the Respondent's decision, Respondent cannot simply present a legitimate reason for its action but must persuade, by a preponderance of the evidence, that the same action would have taken place even in the absence of the protected conduct.

b. Rublee's demotion and removal of company-owned truck privilege on January 15, 2015

As mentioned above, on January 15, 2015, Lynn summoned Rublee to his office and while asking him if he was looking for other work and unlawfully interrogating him about the Union, he impliedly threatened to discharge him. In addition, Lynn told him that he was "pulling [his] truck," and directed him to work as a helper with foreman Terhune. As I have found above, Rublee was demoted from his position as foreman to the classification of helper, and his company-owned truck privilege was removed. Thereafter, Rublee worked as a helper until his discharge on February 7, 2015.

The record establishes that foremen were provided the privilege of using a company-owned truck, the tools contained therein, and the use of a gas card that accompanied each vehicle.[15] This benefit or privilege was clearly a term and condition of employment for the Respondent's foremen. The foremen were also allowed to use the trucks for personal use. After his demotion on January 15, Rublee was never reassigned the use of the company-owned truck or its tools and gas card, and he was denied use of the vehicle for transportation to and from work and for personal use.

I find that the General Counsel has made a prima facie showing that Rublee's protected conduct was a "motivating factor" in the Respondent's decision to demote him and remove his privilege to use the company-owned truck. It is undisputed that Rublee engaged in union activity by talking to employees, including Hall and Terhune, about returning to the Union. Lynn also had knowledge of Rublee's union and protected activity, as he admitted that prior to Rublee's demotion, around the time he received a raise in September 2014, Hall told him that Rublee was still talking about the Union. The evidence also reveals that Lynn not only had knowledge of Rublee's union and protected activity, but that he harbored animus toward such activity. Lynn's statements to employees that the Union was out to hurt him by taking his workers, and his unlawful interrogation of Rublee's union activities, and threat of the loss of employment for Rublee's engagement in such activities in violation of Section 8(a)(1), constitute strong evidence of animus. The close timing of the adverse employment actions with his engagement in protected activities suggests that Respondent's motivation was unlawful. More importantly, the fact that his demotion and removal of truck use privilege occurred in the same conversation

[15] Although Lynn testified that not all foremen are provided a company-owned truck to use, the Respondent failed to present any evidence identifying any foremen who did not have a company-owned truck assigned to them. (Tr. 86–87). In addition, Lynn's assertion in this regard is belied by the credible testimony of Rublee who testified that during his employment with Respondent, each foreman was assigned a company-owned truck, and that when more than one foreman was working at a jobsite, each drove to the jobsite in their individually assigned company-owned trucks. (Tr. 116; 160). This testimony was never rebutted by the Respondent, and in fact, is consistent with the testimony of John Pinciaro, a former foreman and now supervisor, who testified that all three current foremen under his supervision are assigned company-owned trucks. (Tr. 228).

where Lynn referenced the Union and then unlawfully interrogated him and impliedly threatened him, is direct and unmistakable evidence of unlawful motivation.

Thus, based on the above, the General Counsel has made a prima facie showing that Rublee was demoted and had his company-owned truck privilege removed because of his engagement in union and protected activities. On such a showing, the burden shifts to the Respondent to demonstrate that the same action would have taken place even in the absence of the protected conduct. As mentioned above, the respondent does not sustain its burden by simply showing that a legitimate reason for the action existed. Instead, it must demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *Roure Bertrand Dupont, Inc.*, supra.

I find that the Respondent failed to present a nondiscriminatory justification for having demoted Rublee and removing his company-owned truck privilege. At the trial, the Respondent presented its alleged reason for the actions against Rublee. Respondent's counsel asked Lynn: "So, regardless of whether Mr. Rublee was demoted or not on or about January 15, 2015, what was the basis for that action?" In response, Lynn testified that he removed his truck and had him work with Terhune simply to have Rublee "rid[e] with another foreman for a period of time because [Respondent] only had two foremen on that job and [Lynn] did not want an empty vehicle driving back and forth." (Tr. 82). Thus, the Respondent asserts the basis for its actions was a matter of convenience—simply to have him ride to the worksite with another foremen, rather than have each of them drive their company-owned vehicles to the same site. This asserted reason, however, is inconsistent with the reason proffered by Respondent in its Statement of Position dated May 8, 2015, where it stated that "Mr. Lynn removed Mr. Rublee as a foreman based upon [his] continued poor performance." (GC Exh. 8, p. 2, para. 10 and p. 3, para.16).

Besides the fact that Respondent offered shifting and different reasons for Rublee's demotion and removal of truck privileges, I find that neither of those asserted reasons is supported by the credible record evidence. Lynn's assertion that Respondent based its action on a matter of convenience, so two foremen would not have to ride to the same site in separate vehicles, is belied by the credible and unrebutted testimony of Rublee establishing that when more than one foreman was working on a project together, each drove to the jobsite in their individually assigned company-owned trucks. (Tr. 116). Furthermore, the Respondent's assertion that its actions were based on his alleged "poor performance" is not supported by the record, nor is it plausible. The record is devoid of any credible evidence that Rublee was ever disciplined or warned about "poor performance" problems or issues, or that he was informed that his job was in jeopardy for poor performance issues. In fact, to the contrary, Lynn told him he was doing a good job "quite a few times," and Lynn praised and rewarded him for his "quality of work" on the jobsites. In addition, at the time of his demotion, Rublee had worked on the Aloft job, a year-long project that he worked mostly by himself. Following that job, in late 2014 just shortly before his demotion, he worked on the 173 Elm job as his last job as a foreman. It is undisputed that Lynn specifically assigned Rublee to that job because it was running behind schedule, and he knew Rublee could "pull it back together" and "get it back on schedule." Furthermore, just several months before his demotion, the Respondent granted Rublee a sixth and final wage increase to $19 an hour, effective from October 23, 2014 to February 7, 2015,

making him the second highest paid field employee for the Respondent and one of the employees who received the highest number of pay raises at the company.

It is implausible that someone whose performance was so "poor" that it warranted his demotion and removal of his company truck use privileges, would be informed by the owner that he was doing a good job; be rewarded for the quality of his work with six pay raises over a two-year period; be the Respondent's second highest paid field employee; be the recipient of numerous bonuses; be chosen by the Respondent to work on one of its biggest projects lasting one year (and performing most of the work by himself); and be chosen by the Respondent to work on a job which was behind schedule to "pull it together" and get it back on schedule. These facts simply do not support the Respondent's assertion that Rublee suffered from "poor performance" problems, and the fact that it would base Rublee's demotion and removal of company-owned vehicle privilege on that reason is not believable or plausible. As such, I reject Respondent's asserted reasons and find they are pretextual. This suggests that Respondent's true motive was unlawful. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *L.B.&B. Associates, Inc. d/b/a North Fork Services Joint Ventures*, 346 NLRB 1025, 1027 (2006).

In making this finding, I note that the Board has found violations of Section 8(a)(3) and (1) of the Act in similar circumstances, where an employer demoted an employee and removed his ability to use his company-owned truck and gas card on the basis of his protected activities. *Diversified Enterprises, Inc.*, 353 NLRB 1174 (2009).[16] Thus, the Respondent has failed to show by a preponderance of the evidence that Rublee would have been demoted and had his company-owned truck privileges removed in the absence of his union and protected activities. I therefore find that the Respondent's actions violated Section 8(a)(3) and (1) of the Act.

c. Rublee's discharge on February 7, 2015

As mentioned above, when Rublee was discharged he was admonished for, and coercively prohibited from, discussing his wages with employees and talking about the Union, in violation of the Act. Rublee's discharge also followed his discriminatory demotion and removal of his company-owned truck use privilege approximately three weeks earlier, also in violation of the Act. Based on the record evidence, much of it undisputed or admitted, I find that an analysis under *Wright Line*, the Board's causation test in all cases alleging violations of Section 8(a)(3) and (1) of the Act turning on employer motivation, demonstrates that Rublee's discharge was also discriminatorily motivated.

First, I find that the General Counsel has made a prima facie showing that Rublee's union and protected conduct was a "motivating factor" in the Respondent's decision to discharge him. As mentioned above, Rublee's engagement in union activity by talking about the Union and the protected activity of discussing his wages with other employees is undisputed. There is also no question that Lynn was aware of Rublee's protected activity, as he admitted that prior to

[16] In *Diversified Enterprises* however, the Board did not rely on *Wright Line* in finding the violation because the employer conceded that its actions were motivated solely by the employee's protected activities. Id. at fn. 3. Therein, the employer acted on a purported, but erroneous, belief that the employee was a supervisor, and violated the Act. See e.g., *Barstow Community Hospital*, 352 NLRB 1052 (2008).

discharging Rublee he was informed by Hall that Rublee was talking to employees about the Union, and he was informed by Terhune that Rublee was discussing his wages with other employees. In addition, as mentioned above, Lynn harbored animus toward the Union and Rublee's protected activity, as reflected in his statements that the Union was out to hurt him, in his unlawful interrogation of Rublee and threat of discharge for Rublee's engagement in such activities in violation of Section 8(a)(1), and in his unlawful demotion and removal of truck use privilege in violation of Section 8(a)(3) and (1) of the Act. Most importantly, there is direct evidence that Rublee's discharge was motivated by his protected activity, as he was discharged immediately after Lynn admonished him for discussing his wages with other employees and for talking about the Union with other employees.

On such a showing, the burden shifts to the Respondent to demonstrate that Rublee would have been discharged even in the absence of the protected conduct. As mentioned above, the burden is not sustained by showing a legitimate reason for the discharge existed, but instead the Respondent must demonstrate by a preponderance of the evidence that Rublee would have been discharged even in the absence of his protected conduct. *Roure Bertrand Dupont, Inc.*, supra.

Other than the express and undisputed statements about the Union and Rublee's discussion of wages articulated by Lynn in the February 7, 2015, telephone call, the Respondent offered a number of different and inconsistent reasons for Rublee's discharge. For the reasons set forth below, I find the record establishes that the Respondent's asserted reasons are pretext for its unlawful motivation.

i. New York State Unemployment Insurance document

The Respondent never issued Rublee a letter upon his discharge that set forth the reasons for that action. However, on March 2, 2015, approximately one month after Rublee was discharged, Lynn opposed Rublee's unemployment insurance application by notifying the New York State Department of Labor Unemployment Insurance Division that Rublee was discharged due to a "continual loss of tools and materials and discussed many times with other employees about leaving to competitors." (GC Exh. 9).

Lynn testified that Respondent's competitors included union contractors (Tr. 71), so that statement could be viewed as an admission that Rublee was discharged for discussing the Union and leaving to work for union contractors. However, Lynn failed to elaborate or explain at the hearing what he meant by that statement. With regard to the alleged continual loss of tools and materials, the record is devoid of any evidence that Rublee lost tools or materials, or that such was a legitimate basis for his discharge. In fact, Respondent Project Manager Todd North testified that he was the management official responsible for the Respondent's tools and materials, and he never discovered that any of Rublee's tools or materials were missing. (Tr. 319). Thus, Lynn's assertion that Rublee was discharged for lost tools and materials was contradicted by North's testimony, and I find that assertion is without merit.

Interestingly, I note North testified that he played a role in Rublee's discharge by recommending that he be discharged after seeing the messy condition of his truck and the condition of his tools. North testified that he had to fix a threading machine and hammer drill

assigned to Rublee sometime between April and October 2014. (Tr. 298–292). While he testified on direct-examination that the threading machine was likely subject to abuse causing its need for repair, he also testified on cross-examination that Rublee's machine had more wear than usual because he was working on the Aloft job, which was a year-long job, and that such wear, rather than abuse, could have caused the need for repairs. (Tr. 320). I find that any asserted reason for Rublee's discharge based on the alleged abuse of tools is not credible or supported by the record evidence. In this regard, I note that Rublee was never written up or disciplined for abuse of tools, and the discovery of the tools in Rublee's assigned truck was made after Lynn questioned Rublee about talking about the Union on January 15 when the truck was removed. (Tr. 112). Furthermore, when Rublee was discharged, Lynn never stated that abuse of tools was the reason for his discharge. I also note that if abuse of tools was truly the reason for the discharge, it is implausible that the Respondent would have continued to let him work from January 15, when the abuse of the tools was allegedly discovered, until February 7, 2015.

Furthermore, I find that North's allegation that Rublee was discharged because of the messy condition of his truck is likewise not believable or supported by the record. Neither Lynn, North, nor any other management official, ever informed employees that failure to clean their trucks was an offense that could result in discharge. (Tr. 322). In addition, Rublee was never written up or issued discipline for having a messy truck. (Tr. 322). Finally, North testified that he spoke to two other employees about the cleanliness of their company-owned trucks, but neither of them was ever disciplined for that issue. (Tr. 321).

On the basis of the above, I find no merit in the Respondent's asserted reasons that Rublee was discharged for the loss of tools and material, or that he was discharged for the condition of his company-owned truck and tools.

ii. The Respondent's Statements of Position

The Respondent alleged for the first time in its Statement of Position submitted approximately 2 months after its unemployment insurance filing, that "the decision to discharge Rublee was based solely and exclusively on Rublee's repeated and continued poor work performance and Rublee's demeaning actions against fellow employees and the employer." (GC Exh. 8, pp. 1–2). These reasons differ from those the Respondent set forth in the unemployment insurance document, as there is no mention in the Statements of Position that Rublee was discharged for the continual loss of tools and materials and his discussions with other employees about leaving to work for competitors. While the Respondent mentioned in its Statement of Position that Rublee did not properly store his tools in the truck and they were covered with snow, it did not assert that the tools were lost, as it had in its submission to the New York State Unemployment Insurance Division.

The Respondent also asserted for the first time in its Statements of Position that Rublee's jobsites were "routinely disorganized" and there was a "recurrent issue of tools not being able to be located at the various jobsites," which Respondent somehow tied to his alleged "poor work performance." (GC Exh. 8, p. 3). These assertions, however, are not supported by the record. The Respondent obviously thought highly of Rublee's job performance on the various jobs. He was assigned to work the Aloft job, the Respondent's biggest and longest job, which he worked mostly by himself. Rublee was also assigned to work on the 173 Elm job just before he was

discharged because Lynn believed Rublee could get the job back on schedule. While Lynn informed Rublee that certain materials should be stored inside the jobsite instead of outside the building on the 173 Elm job in December 2014, Rublee was never told he would be disciplined for that, or that his job was in jeopardy. (Tr. 421–425). In fact, Rublee credibly testified that he was unable to bring the material inside because the first floor of the jobsite was being finished and the material would not fit into the basement of the site. (Tr. 474–475). Rublee asked Lynn for tarps to cover the material, and even though Lynn told him there were tarps in the Respondent's shop, Rublee could not locate them. Thereafter, Rublee was moved to a different jobsite.

While Lynn also testified that he discussed the organization of the Aloft job with Rublee (Tr. 182), there is insufficient credible evidence to establish that any disorganization on that job warranted a basis for his discharge. In this connection, the Respondent assigned Rublee to that large year-long job which he worked mostly by himself. The Respondent elicited testimony from helper Buck Seekings regarding the lack of organization on that jobsite, but Seekings worked on that job approximately 10 hours over the year-long project (Tr. 262–262), and he attributed any disorganization on that site, in part, to the fact that many crafts were working on the jobsite. (Tr. 254). Seekings also testified that Rublee had to change pipes that the Respondent had installed so the plumbers could install their pipes (Tr. 254), which would not have been Rublee's fault. In addition, it is important to note that Lynn testified that it was the helper's role to organize the materials on the jobsite (Tr. 33–34), but Rublee worked most of that job by himself without any helpers.

With regard to the asserted reason that Rublee's discharge was based on his demeaning actions against fellow employees and the employer (GC Exh. 9, pp. 1–2), the Respondent failed to present any credible evidence of Rublee displaying "demeaning" actions other than a statement to a coworker regarding his wages in which Rublee commented that it was "just another day working for peanuts" when asked how things were going. (Tr. 65; GC Exh.7, p. 3, para. 3). There is however, no assertion or evidence that Rublee was warned, counseled, or disciplined for that comment. It is simply not believable that such a comment would warrant a basis for his discharge. If it truly were a legitimate basis for his discharge, it is plausible that the Respondent would have directed Rublee to an employee assistance program or counseling of some nature in hopes of addressing any issues that it believed would cause demeaning actions towards others. The Respondent, however, neglected to take any such action prior to discharging him. It is equally plausible that if in fact that was a legitimate basis for his discharge, the Respondent would have notified him that such a comment could lead to discipline or his discharge, but likewise, there is no evidence that Respondent took such actions or that it ever made Rublee aware that it viewed such a comment as something warranting discharge.

In addition, if these asserted reasons for discharge were true, I find it implausible that Lynn would have told Rublee he was doing a good job "quite a few times," praised and rewarded his "quality of work" with numerous pay raises, issued him bonuses that were based on performance (in particular the last one on December 11, 2014, shortly before his discharge), and made him the second highest paid field employee for the Respondent. Thus, I find no merit in the Respondent's shifting reasons in the Position Statements that Rublee was discharged based on his "poor performance" in the form of disorganized worksites, including tools and materials, and his demeaning actions against fellow employees and the employer.

iii. The trial testimony and post-hearing brief

Lynn testified that Rublee was discharged for his "poor attitude," which is similar to Respondent's assertion in its Statement of Position that Rublee was discharged for his "demeaning actions against fellow employees and the employer." However, Lynn was unable to provide an example of the alleged "poor attitude" that warranted his discharge. When asked if he relied on Rublee's statement to an employee that it was "just another day working for peanuts" as support for the discharge, Lynn answered "I would say yes, that could be an example." When asked "Was that one of the examples that you relied on in terminating his employment?" Lynn answered: "There were multiple reasons. I don't—I'm not sure, it was a long time ago." Then, when asked by the Administrative Law Judge, "you're not sure whether that was what you relied on in terminating him?" Lynn answered, "there were a lot of factors that went into [his] termination." (Tr. 65–66). Such incredible testimony only bolsters my finding above that there is no merit in the allegation that Rublee was discharged for "demeaning actions," and it is evidence that the similar assertion that he was discharged for his "poor attitude" is likewise meritless. These assertions are simply pretext for Respondent's unlawful motivation.

In addition, at the trial in this matter, for the first time the Respondent asserted that Rublee was responsible for an alleged missing "fire pump bypass pressure gauge" that Respondent valued at approximately $1,500. (Tr. 306–309; 327).[17] According to Project Manager North, the gauge which was needed for testing a fire pump at the Aloft job in November and December of 2014 went missing some time in the summer of 2014. (Tr. 307). However, such an assertion is belied by the fact that the system was tested on that project on three occasions. (Tr. 324–325). In fact, Rublee credibly testified that the pump could not be tested without the gauge and that particular pump was tested on three occasions, two of which he attended. (Tr. 470). The Respondent failed to present any credible evidence that the gauge was missing, or even if it were missing, that Rublee was responsible for its disappearance. Respondent's unsupported assertions are also belied by the fact that it failed to attribute the alleged missing gauge to Rublee in its two Statements of Position, or in Lynn's affidavit. I find it reasonable to believe that if that were truly a basis for his discharge, the Respondent would have alleged such in those previous statements and in Lynn's affidavit testimony. More importantly, there is no evidence that Respondent ever notified Rublee that it believed he was responsible for losing the gauge, and it never disciplined him for being responsible for the fact that it allegedly went missing. I find this assertion unavailing and without support in the record.

The record also reveals that Lynn asserted in his sworn affidavit that Rublee was "stealing time" while employed by the Respondent. (Tr. 72). When questioned at the hearing about that assertion, Lynn testified that he became aware in early 2014 of discrepancies in Rublee's time reported and the actual time he worked. (Tr. 89). Even though Lynn testified that he believed he informed Rublee of that alleged wrongdoing at the time he was discharged, the Respondent failed to assert that as a basis for his discharge in its New York State unemployment filing, and it neglected to mention what would appear to be a very serious offense in its two

[17] It also asserted in its brief that Rublee was discharged for "neglect of company assets," which presumably was a reference to company tools or equipment such as the pressure gauge.

Statements of Position. Even though the Respondent failed to allege at the hearing or in its brief that Rublee's alleged theft of time was a basis for his discharge, I nevertheless find that the record does not support any theft of time by Rublee. In addition, it is important to note that Lynn's assertion was undermined by his testimony that it was common for there to be discrepancies between the times reported and the times worked. (Tr. 92). As such, I find no merit to the contention that Rublee was "stealing time," and I similarly reject it.

Finally, for the first time at the trial, the Respondent asserted that Rublee was discharged for his performance on jobs spanning over his 2 full years of employment with the company. It reiterated that contention in its post-hearing brief, where it asserted that Rublee was discharged for the quality of his work, lack of organization, and poor productivity.[18] The Respondent offered into evidence an exhibit consisting of various documents and charts pertaining to all the jobs Rublee had worked (R. Exh. 5), and Lynn testified that Rublee was at fault for the fact that the hours worked on some of those jobs failed to match up with the hours the Respondent bid for the jobs. (Tr. 425). Lynn also specifically testified that Rublee's performance on those jobs had a bearing on the decision to discharge him. (Tr. 421). I find that the Respondent's reliance on that document is misplaced, as Lynn admitted that the bid estimations could have been wrong and thereby the cause of the difference in hours, and Lynn admitted that the exhibit contained hours of other employees in its assessment of Rublee's performance on each project. (Tr. 424–425). In addition, the Respondent's assertion is belied by Lynn's admission that going over on estimated hours was not a legitimate basis for disciplining or discharging employees, as he stated in his affidavit that "if a job goes over on hours there is no discipline." (Tr. 439–440).

I also find the assertion that Rublee's work performance was a basis for his discharge is not credible or believable. Lynn testified that the Respondent's analysis on the jobs performed by Rublee as set forth in R. Exh. 5, was done on a continual basis and at the time the projects were performed. (Tr. 418). However, at the time the various projects were being performed, the Respondent never notified Rublee that his being over on hours would result in discipline, and it is undisputed that he was never issued any discipline at the time those alleged infractions occurred. It defies credulity to believe that the Respondent would not discipline Rublee when those alleged infractions occurred, especially in light of the Respondent's assertion that those infractions constituted a basis for his discharge.

iv. Disparate treatment as evidence that asserted reasons for discharge were false

The record establishes that while Rublee was allegedly discharged for the quality of his work, lack of organization, and poor productivity, other employees performed faulty work that required repair without being subject to discipline or discharge. In fact, there is no evidence that any employee other than Rublee was demoted, disciplined or discharged by the Respondent for work performance or production issues. This is despite the fact that Rublee credibly testified that Buck Seekings performed unsatisfactory work on at least two occasions. On one occasion

[18] In its post-hearing brief, the Respondent's asserted reasons for Rublee's discharge failed to include that he was supposedly discharged for "discussing many times with other employees about leaving to competitors," which was alleged as a basis for discharge in the Respondent's New York State unemployment insurance filing. It also failed to allege that Rublee was discharged for his "demeaning actions against fellow employees" as it previously alleged in its Statements of Position.

Seekings improperly installed a valve in a warehouse which caused a leak, and on another occasion on the 173 Elm job, he left exposed piping that was installed with crooked hangers, which required that Rublee remove and reinstall the piping. (Tr. 128–132). Rublee testified that those performance problems were reported to Lynn, but Seekings was never reprimanded or disciplined for his work performance. (Tr. 132, 267).

In addition, Pinciaro testified that he performed faulty work, but that he had the opportunity to correct his work without being subject to reprimand or discipline. Instead of being discharged, he was informed that the work was "unsatisfactory" and he was allowed to correct it. (Tr. 233–235). These examples of disparate treatment by the Respondent further undermine the legitimacy of its alleged reasons for Rublee's discharge, as the Board has held that disparate disciplinary treatment following an employee's protected activity is evidence that the respondent's asserted reason for discharging that employee was false. *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 6 (2014); *Approved Electric*, 356 NLRB 238, 240 (2010).

v. The Respondent's shifting reasons lack merit and are pretext for its unlawful motivation

In summary, I find that the Respondent's shifting reasons for Rublee's discharge set forth at the hearing and in its brief, like its alleged reasons offered in its unemployment insurance filing and Statements of Position, were not supported by the record evidence. The Respondent failed to present any credible evidence which would establish that Rublee had a poor attitude, was responsible for a missing pump gauge, neglected company assets, or was "stealing time." There is likewise no credible evidence that Rublee's work performance was poor or that it lacked quality, organization, or productivity as alleged. The Respondent also never notified Rublee that such alleged problems or infractions existed during his two years of employment, and he was never written up or disciplined in any way for such alleged infractions. In addition, the Board has found that existence of shifting explanations or reasons for an employer's adverse employment action are persuasive evidence that the asserted reasons are pretextual. *Lucky Cab Company*, supra at slip op. at 4.

Finally, and most importantly, I find that the Respondent's reasons for Rublee's discharge alleged at the hearing and in its brief suffer the same fatal flaw that its previously alleged reasons for discharge discussed above possess—they are simply not credible or plausible based on the record evidence. I find it incredible and implausible that Rublee was discharged for the reasons alleged by the Respondent when it is undisputed that prior to his discharge, he was never disciplined or suspended, and Respondent never indicated at any time during his two years of employment that his job was in jeopardy. I also find it implausible that such asserted reasons were the basis of Rublee's discharge, when the record reveals that Lynn: informed Rublee "quite a few times" that he was doing a good job; placed Rublee on the Respondent's largest year-long project which he worked mostly by himself; selected Rublee to work a job that was behind schedule because he believed Rublee could bring it back on schedule; praised and rewarded Rublee for his "quality of work" by issuing him three bonuses based on performance, including one issued in December 2014, shortly before he was discharged; and rewarded Rublee with six pay raises over his 2 years of employment, making him the second highest paid field employee for the Respondent. This evidence simply belies the Respondent's assertions and does not support the numerous shifting reasons proffered by the Respondent as the basis for Rublee's discharge. Therefore, I find that the Respondent's asserted reasons are pretextual, and the facts

of this case warrant finding that the Respondent's true motive was unlawful. *Shattuck Denn Mining Corp. v. NLRB*, supra; *L.B.&B. Associates, Inc.*, supra.

Accordingly, based on the record evidence in this case, and the well-established Board law discussed above, I find that on January 15, 2015, the Respondent, by Lynn's statements to Rublee, unlawfully interrogated him about his union membership, activities, and sympathies, and impliedly threatened him with the loss of employment because of his union activities, sympathies, and support, both in violation of Section 8(a)(1) of the Act. In addition, I find that the Respondent, on February 7, 2015, by Lynn's statements, unlawfully prohibited Rublee from discussing his wages and the Union with other employees, both also in violation of Section 8(a)(1) of the Act. I further find that the Respondent, on January 15, 2015, demoted Rublee from his job as foreman, removed his privilege to use the company-owned truck, and then subsequently discharged him on February 7, 2015, because of his union and protected concerted activities, including discussing and disseminating wage information among employees and talking about the Union with other employees, in violation of Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Road Sprinkler Fitters Local Union No. 669, U.A., AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by:

(a) on or about January 15, 2015, unlawfully interrogating its employee about his union membership, activities, and sympathies;

(b) on or about January 15, 2015, impliedly threatening its employee with loss of employment because of his union activities, sympathies, and support;

(c) on or about February 7, 2015, prohibiting its employees from discussing their wages with other employees; and

(d) on or about February 7, 2015, prohibiting employees from discussing the union with other employees.

4. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by:

(a) demoting its employee Michael Rublee from the job classification of foreman to helper and removing his privilege of using the company-owned truck on or about January 15, 2015, for engaging in union and/or protected concerted activities; and

(b) discharging its employee Michael Rublee on or about February 7, 2015, for engaging in union and/or protected concerted activities, including discussing and disseminating wage information and talking about the Union with other employees.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily demoted Michael Rublee from the classification of foreman to helper and having discriminatorily removed his privilege of using the company-owned truck, shall be ordered to reinstate his privilege of using the company-owned truck and make him whole for any loss of earnings[19] and other benefits suffered as a result of the discrimination against him. Because these violations found do not involve a cessation of employment, the make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, the Respondent, having discriminatorily discharged Michael Rublee, shall be ordered to offer him reinstatement to his former position of foreman, and shall also be ordered to make him whole for any loss of earnings and other benefits he may have suffered as a result of that discrimination against him. As this violation involves a cessation of employment, backpay shall be computed on a quarterly basis, less any interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

I shall order Respondent to file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Respondent shall also compensate Rublee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

The Respondent shall also be ordered to expunge from its files any references to the discriminatory demotion, removal of company-owned truck privileges, and discharge of Rublee, and notify him in writing that this has been done and that evidence of the discriminatory and unlawful actions will not be used as a basis for future personnel action against him.

The General Counsel also seeks an order requiring that the Respondent reimburse Rublee for search-for-work and work-related expenses regardless of whether Rublee received interim earnings for a particular quarter. The General Counsel asserts that these expenses should be

[19] Although the evidence does not show that Rublee lost wages as a result of his demotion, I find that is a matter more appropriately to be determined at a compliance proceeding.

calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged on these amounts as prescribed in *Kentucky River Medical Center*, supra. The Respondent opposes awarding search-for-work and work-related expenses and argues that if Rublee's discharge is found to be unlawful, the only appropriate relief should consist of reinstatement and backpay. (Id. at p. 22).[20]

The General Counsel notes that Board law provides that discriminatees are entitled to reimbursement for expenses incurred in their search for interim employment. However, the General Counsel concedes that, at present, Board law considers such expenses as an offset to a discriminatee's interim earnings, rather than calculating them separately. *West Texas Utilities Co.*, 109 NLRB 936, 939 fn. 3 (1954). I am, of course, obligated to follow existing Board precedent in resolving the issues present in this case. *Pathmark Stores, Inc.*, 342 NLRB 378, 378 fn. 1 (2004); *Waco, Inc*., 273 NLRB 746, 749 fn. 14 (1984). Accordingly, I shall deny the General Counsel's request for this additional remedy.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[21]

ORDER

The Respondent, Armor Construction, LLC, Falconer, New York, its officers, agents, and representatives, shall

1. Cease and desist from

   (a) Demoting employees from foremen to helpers and removing their privilege of using the company-owned truck for engaging in union and/or protected concerted activities;

   (b) Discharging employees for engaging in union and/or protected concerted activities, including discussing and disseminating wage information and discussing the Union with other employees;

   (c) Interrogating employees about their union membership, activities, and sympathies;

   (d) Impliedly threatening employees with loss of employment because they engage in union activities, sympathies, and support;

   (e) Prohibiting employees from discussing their wages with other employees;

[20] With regard to the remedy issue, the Respondent asserted in its brief that "through discussion with union counsel prior to hearing, it was revealed that Rublee had received work through Local 699" (R. Br. at p. 22). While neither the General Counsel nor Charging Party filed a motion to strike this assertion from the Respondent's brief, I note that the assertion is not based on any evidence found in this record, and therefore, that assertion has not been given any consideration.

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(f) Prohibiting employees from discussing the union with other employees; and

(g) In any like or related manner, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Within 14 days from the date of this Order, offer Michael Rublee full reinstatement to his former job of foreman and reinstate his privilege of using a company-owned truck, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make whole Michael Rublee for any loss of earnings and other benefits suffered as a result of the unlawful demotion, removal of company-owned truck privileges, discharge and discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Compensate Michael Rublee for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for said employee.

(d) Within 14 days from the date of this Order, remove from its files any references to its unlawful demotion, removal of company-owned truck privileges, and discharge of Michael Rublee, and within 3 days thereafter notify said employee in writing that this has been done and that the demotion, removal of company-owned truck privileges, and discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of the Order.

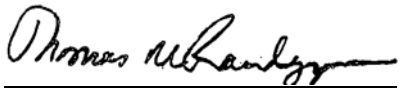
(f) Within 14 days after service by the Region, post at its facility in Falconer, New York, copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 15, 2015.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 12, 2016



Thomas M. Randazzo
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union
Choose a representative to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT interrogate you about your union membership, activities and sympathies;

WE WILL NOT impliedly threaten you with loss of employment because of your engagement in union activities, sympathies, and support;

WE WILL NOT prohibit you from discussing your wages with other employees;

WE WILL NOT prohibit you from discussing the union with other employees;

WE WILL NOT demote you from the job classification of foreman to helper, or remove your privilege of using the company-owned truck for engaging in union and/or protected concerted activities;

WE WILL NOT discharge you for engaging in union and/or protected concerted activities, including discussing and disseminating wage information and discussing the Union with other employees; and

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Michael Rublee full reinstatement to his former job of foreman and reinstate his privilege of using the company-owned truck, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Michael Rublee whole for any loss of earnings and other benefits resulting from his unlawful demotion, removal of company truck privileges, and discharge, less any net interim earnings, plus interest.

WE WILL compensate Michael Rublee for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and **WE WILL** file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for said employee.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful demotion, removal of company truck privileges, and discharge of Michael Rublee, and **WE WILL**, within 3 days thereafter, notify said employee in writing that this has been done and that his demotion, removal of company truck privileges, and discharge will not be used against him in any way.

ARMOR CONSTRUCTION, LLC
(Employer)

Dated: _____ By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1–866–667–NLRB (1–866–667–6572). Hearing impaired persons may contact the Agency's TTY service at 1–866–315–NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

Niagara Center Building
130 S. Elmwood Avenue, Suite 630
Buffalo, NY 14202–2387
(716) 551–4931
Hours: 8:30 a.m. to 5:00 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/03-CA-148130 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, SE., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (716) 551–4931.